

ORDINANCE NO. 1826

AN ORDINANCE OF THE CITY COUNCIL OF THE
CITY OF LODI AMENDING LODI MUNICIPAL CODE
TITLE 5 – PERMITS AND REGULATIONS – BY ADDING
CHAPTER 5.17, “STATE VIDEO FRANCHISES”

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WHEREAS, the Legislature of the State of California (the State) has adopted the Digital Infrastructure and Video Competition Act of 2006 (DIVCA); and

WHEREAS, the Governor of the State of California signed DIVCA on September 29, 2006; and

WHEREAS, DIVCA became effective on January 1, 2007; and

WHEREAS, DIVCA establishes a regulatory structure for the State to issue franchises to video service providers; and

WHEREAS, DIVCA establishes that local entities, such as the City of Lodi, are responsible for administration and implementation of certain provisions of DIVCA; and

WHEREAS, DIVCA requires that the City establish, by ordinance, financial support provisions for Public, Educational and Governmental Access (PEG) channel facilities; and

WHEREAS, DIVCA requires that the City adopt, by ordinance or resolution, a schedule of penalties for any material breach by a State video franchise holder for violation of customer service and protection standards that the City is permitted to enforce; and

WHEREAS, as of November 4, 2009, there are two State-franchised cable operators providing cable service within the City; and

WHEREAS, two of the cable franchises in the City are held by Comcast and AT&T; and

WHEREAS, former City franchise-holder Comcast no longer provides noncash support to the City for PEG programming or facilities.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF LODI AS FOLLOWS:

SECTION 1. Lodi Municipal Code Title 5 – Permits and Regulations – is hereby amended by adding Chapter 5.17, “State Video Franchises,” to read as follows:

CHAPTER 5.17 STATE CABLE TELEVISION FRANCHISES

Section:

- 5.17.010 Purpose.
- 5.17.020 Definitions and Interpretation of Language.
- 5.17.030 State Franchise Holder Fee.
- 5.17.040 State Franchise Holder PEG Fees.
- 5.17.050 Payment of Fees.
- 5.17.060 Audits.
- 5.17.070 Late Payments.
- 5.17.080 Lease of City Property or Network.
- 5.17.090 Customer Service and Consumer Protection Standards.
- 5.17.100 Penalties for Violations of Standards.
- 5.17.110 General Requirements.
- 5.17.120 Permits.
- 5.17.130 Terms and Conditions.
- 5.17.140 Relocation of Franchise Property and Appurtenances.
- 5.17.150 Removal of Abandoned Facilities.
- 5.17.160 Notification to Residents Regarding Construction or Maintenance.
- 5.17.170 Identification Required.
- 5.17.180 Construction Requirements and Protection of Health and Safety.
- 5.17.200 Emergency Alert Systems.
- 5.17.210 Interconnection for PEG Programming.
- 5.17.220 Notices.
- 5.17.230 Rights Reserved.
- 5.17.240 Compliance with Law.

5.17.010 PURPOSE.

This Chapter applies to all cable service or video service providers who are applying for, or have been awarded, a franchise under California Public Utilities Code Section 5800 et seq., the Digital Infrastructure and Video Competition Act of 2006, ("DIVCA), to serve any area within the City of Lodi, including any cable service or video service providers who are subject to DIVCA. By this Chapter the City of Lodi intends to assume to the fullest extent possible all obligations, rights and privileges afforded to it by DIVCA and any other applicable law. Moreover, to the extent this Ordinance is pre-empted by DIVCA now or as amended in the future, the requirement of DIVCA shall control.

5.17.020 DEFINITIONS AND INTERPRETATION OF LANGUAGE.

For purposes of this Chapter, the following terms, phrases, words, and their derivations shall have the meaning given in this section. Unless otherwise expressly stated, words not defined in this Chapter shall be given the meaning set forth in California Public Utilities Code, Section 5800 et seq. as amended from time to time. When not inconsistent with the context, words used in the present tense include the future, words in the plural number include the singular number, words in the singular number include the plural number, and "including" and "include" are not limiting. The word "shall" is always mandatory.

- (a) Access, PEG access, PEG use, or PEG. "Access," "PEG access," "PEG use," or "PEG" means the availability of a cable or video system for public, educational, or governmental use by various agencies, institutions, organizations, groups, and individuals, including the City of Lodi and its City use channels or any existing agreement between the City and any incumbent cable operator, to acquire, create, and distribute programming not under a state franchise holder's editorial control.
- (b) City. "City" means the City of Lodi, California.
- (c) City Council. "City Council" means the City Council of the City of Lodi.
- (d) City Manager. "City Manager" means the City Manager of the City of Lodi or his or her designee.
- (e) Gross revenues. "Gross revenues" means all revenues actually received by the holder of a state franchise that are derived from the operation of the holder's network to provide cable service or video service within the incorporated areas of the City, subject to the specifications of California Public Utilities Code Section 5860.
- (f) Director. "Director" means the Deputy City Manager/Internal Services Director of the City of Lodi or his or her designee.
- (g) State Franchise Holder, Holder of a State Franchise, Holder of the State Franchise, or Holder. "State Franchise Holder," "holder of a state franchise," "holder of the state franchise," or "holder" means any person or group of persons who has been issued a franchise by the California Public Utilities Commission to provide cable service or video service, as those terms are defined in Public Utilities Code Section 5830, within any portion of the City of Lodi.

5.17.030 STATE FRANCHISE HOLDER FEE.

Any State Franchise Holder operating within the City shall pay to the City a State Franchise Holder fee equal to five percent of gross revenues, as defined in this Chapter and applicable law. Nothing in this section is intended to limit the City's ability to impose utility user taxes and other generally applicable taxes, fees and charges that are applied in a nondiscriminatory and competitively neutral manner.

5.17.040 STATE FRANCHISE HOLDER PEG FEES.

Any State Franchise Holder operating within the City shall pay to the City a PEG fee equal to one percent of gross revenues, as defined in this Chapter and applicable law, unless a different amount is payable in accordance with applicable law or resolution adopted by the City Council.

5.17.050 PAYMENT OF FEES.

The State Franchise Holder shall pay quarterly all fees required pursuant to this Chapter in a manner consistent with Public Utilities Code Section 5860. The State Franchise Holder shall deliver to the City by check or other means agreeable to the City Manager,

a separate payment for the state franchise fee and the PEG fee not later than forty-five days after the end of each calendar quarter. Each payment made shall be accompanied by a summary explaining the basis for the calculation of the fees.

5.17.060 AUDITS.

The City may examine the business records of the holder of a State Franchise in a manner not inconsistent with California Public Utilities Code Section 5860(i).

5.17.070 LATE PAYMENTS.

In the event a State Franchise Holder fails to make any payment required by this Chapter on or before the due dates specified in this Chapter, the City shall impose a late charge at the rate per year equal to the highest prime lending rate during the period of delinquency, plus one percent unless a different rate is set by applicable law or resolution adopted by the City Council.

5.17.080 LEASE ~~OF~~ CITY PROPERTY OR NETWORK.

To the extent not inconsistent with California Public Utilities Code Section 5840(q)(2)(B), in the event a State Franchise Holder desires to lease access to City property beyond the access conferred by its State Franchise or to a network owned or controlled by the City, the City may set terms and charge a fee for access to the property or City network separate and apart from any franchise fee or other fee charged to the State Franchise Holders pursuant to this Chapter. The City Council may set any such fee by resolution.

5.17.090 CUSTOMER SERVICE AND CONSUMER PROTECTION STANDARDS.

Each State Franchise Holder shall comply with all applicable customer service and consumer protection standards, including, to the extent not inconsistent with California Public Utilities Code Section 5900, all existing and subsequently enacted customer service and consumer protection standards established by local, state or federal law and regulation.

5.17.100 PENALTIES FOR VIOLATIONS ~~OF~~ STANDARDS.

- (a) The City shall monitor compliance with and enforce the provisions of this Chapter and DIVCA.
- (b) For any material breach, as defined in California Public Utilities Code Section 5900(j), by a State Franchise Holder of applicable customer service and consumer protection standards, the City Manager, or the City Manager's designee, in his or her sole discretion may impose the following fines or penalties:
 - (1) For the first occurrence of a material breach, a fine of five hundred dollars shall be imposed for each day the violation remains in effect, not to exceed one thousand five hundred dollars for each violation.

- (2) For a second material breach of the same nature within twelve months, a fine of one thousand dollars shall be imposed for each day the violation remains in effect, not to exceed three thousand dollars for each violation.
- (3) For a third or further material breach of the same nature within twelve months, a fine of two thousand five hundred dollars shall be imposed for each day the violation remains in effect, not to exceed seven thousand five hundred dollars for each violation.
- (c) Any penalties imposed by the City shall be imposed in a manner not inconsistent with California Public Utilities Code Section 5900.
- (d) To the extent not inconsistent with California Public Utilities Code Section 5900, the City, acting through its City Manager or his or her designee, in its sole discretion may waive, modify, or defer the imposition of a penalty.

5.17.110 GENERAL REQUIREMENTS.

Except as expressly provided in this Chapter, the provisions of this Chapter shall apply to all work performed by or on behalf of a State Franchise Holder upon, above or below any street, highway, sidewalk, parkway, alley or other public right-of-way of any kind whatsoever within the City.

5.17.120 PERMITS.

- (a) Prior to commencing any work, a State Franchise Holder shall apply for and obtain a permit in accordance with the applicable provisions of this Chapter and Chapter 12.04 of this Code and shall comply with all other applicable laws and regulations, including, but not limited to, all applicable requirements of Public Resources Code Section 21000 et seq. (the California Environmental Quality Act).
- (b) The Public Works Director shall either approve or deny a State Franchise Holder's application for any permit required under this Chapter in accordance with the applicable terms of Chapter 12.04.
- (c) If the Public Works Director denies a State Franchise Holder's application for a permit, the Director shall, at the time of notifying the applicant of denial, furnish to the applicant an explanation of the reason or reasons for the denial.
- (d) A State Franchise Holder that has been denied a permit by final decision of the Public Works Director may appeal the denial to the City Council whose decision shall be final. Upon receiving a notice of appeal, the City Council shall consider the permit de novo.
- (e) A State Franchise Holder whose permit has been revoked may appeal that decision to the City Council in writing within ten (10) days after issuance of the notice of revocation.

5.17.130 TERMS AND CONDITIONS.

The work of constructing, laying, replacing, maintaining, repairing, abandoning, or removing all property and appurtenances of the State Franchise Holder in, over, under, along, or across any City right-of-way as defined in Chapter 12.04 shall be done to the satisfaction of the Public Works Director and, except where a different outcome is prescribed by applicable law, at the expense of the State Franchise Holder, and in accordance with the terms and conditions of Chapter 12.04.

5.17.140 RELOCATION OF FRANCHISE PROPERTY AND APPURTENANCES.

- (a) The City reserves the right to change the grade, change the width, or alter or change the location of any City right-of-way. If any Franchise Holder's property or appurtenance is installed or maintained by the State Franchise Holder on, along, under, over, in, upon, or across any public right-of way in a manner which prevents or interferes with any alteration or other change of grade, traffic needs, operation, maintenance, improvement, repair, construction, reconstruction, widening, or relocation of the right-of-way, or any work or improvement upon the right-of-way, the State Franchise Holder shall relocate any such property or appurtenances to the satisfaction of the Public Works Director, and, to the extent consistent with existing law at no expense to the City, upon receipt of a written request from the Director to do so and in accordance with the terms of Chapter 12.04. Should the State Franchise Holder neglect or fail to relocate its facilities in a timely manner as required by law after receipt of any such notice, the State Franchise Holder shall be responsible for and shall reimburse the City for any and all costs or expenses incurred by City due to or arising from the failure to relocate the facilities.
- (b) The City reserves the right to lay, construct, repair, alter, relocate, and maintain subsurface or other facilities or improvements of any type or description in a governmental and water, sewer and Electric Utility capacity, but not in a proprietary capacity within the right-of-way over which the franchise is granted. If the City finds that the location or relocation of such facilities or improvements conflicts with the property or appurtenances laid, constructed, or maintained by the State Franchise Holder, the City shall notify the State Franchise Holder of such conflict. To the extent and in the manner required by applicable law, the State Franchise Holder will relocate its facilities as requested by the City.

5.17.150 REMOVAL OF ABANDONED FACILITIES.

Upon the abandonment of all or a portion of its property, the State Franchise Holder shall remove the property in accordance with the terms of Chapter 12.04. If the State Franchise Holder fails to comply with the terms and conditions of abandonment as may be required by this Chapter and Chapter 12.04, the Director of Public Works may direct the State Franchise Holder to remove, or cause to be removed, such facilities at the State Franchise Holder's expense and the State Franchise Holder shall pay to the City the cost of such work. Such decision may be appealed by the State Franchise Holder to the City Council.

5.17.160 NOTIFICATION TO RESIDENTS REGARDING CONSTRUCTION OR MAINTENANCE.

- (a) Prior to any construction activity related to any cable service or video service, a State Franchise Holder shall provide public notification as required by applicable law.
- (b) To the extent practicable, equipment placed on private property shall be placed at the location requested by the property owner..

5.17.170 IDENTIFICATION REQUIRED.

Employees, agents, contractors, and subcontractors of any State Franchise Holder shall at all times be properly identified as employees or agents of the State Franchise Holder while performing any work or other activity within the City on behalf of the State Franchise Holder. Identification shall include the name of the employee or agent. The name and telephone number of the State Franchise Holder shall appear at all construction sites.

5.17.180 CONSTRUCTION REQUIREMENTS AND PROTECTION OF HEALTH AND SAFETY.

Each State Franchise Holder shall comply with all applicable construction requirements of Chapter 12.04 and shall undertake all necessary and appropriate means to protect and preserve health and safety, including complying with all construction requirements of Chapter 12.04 or as otherwise required by the Director of Public Works.

5.17.200 EMERGENCY ALERT SYSTEMS.

Each State Franchise Holder shall comply with the emergency alert system requirements of the Federal Communications Commission in order that emergency messages may be distributed over the State Franchise Holder's network.

5.17.210 INTERCONNECTION FOR PEG PROGRAMMING.

Each holder of a State Franchise and each incumbent cable operator operating under a City franchise issued pursuant to this Code, shall negotiate with each other in good faith to interconnect their networks for the purpose of providing PEG programming including, but not limited to, any exclusive City use channel. Interconnection may be accomplished by any means authorized under California Public Utilities Code Section 5870(h). Each holder of a State Franchise and any incumbent cable operator shall provide interconnection of PEG channels, including any exclusive City use channel on reasonable terms and conditions and may not withhold the interconnection. If a holder of a State Franchise and an incumbent cable operator cannot reach a mutually acceptable interconnection agreement, the City may require the incumbent cable operator to allow the holder of the State Franchise to interconnect its network with the incumbent cable operator's network at a technically feasible point on the State Franchise Holder's network as identified by the Holder or as otherwise permitted by applicable law. If no technically feasible point for interconnection is available, the holder of a State Franchise shall make an interconnection available to the channel originator and shall provide the

facilities necessary for the interconnection. The cost of any interconnection shall be borne by the State Franchise Holder requesting the interconnection unless otherwise agreed to by the State Franchise Holder and the incumbent cable operator. To the extent not inconsistent with California Public Utilities Code Section 5870(h), the City Manager or the City Manager's designee may waive or defer this requirement of interconnection in his or her sole discretion.

5.17.220 NOTICES.

- (a) Each State Franchise Holder or applicant for a state franchise shall file with the City Manager and with the City's communications specialist or other City Manager designee a copy of all applications that the State Franchise Holder or applicant is required to file with the Public Utilities Commission with respect to state franchised video service in the City.
- (b) Unless otherwise specified in this Chapter, all notices or other documentation that a State Franchise Holder is required to provide to the City under this Chapter or the California Public Utilities Code shall be provided to the City Manager and to the City's communications specialist.

5.17.230 RIGHTS RESERVED.

The rights reserved to the City of Lodi under this Chapter are in addition to all other applicable rights of the City, whether granted or reserved by other provisions of the Lodi Municipal Code or as otherwise authorized by federal or state law, and no action, proceeding, or exercise of a right by the City of Lodi shall affect any other rights which may be held by the City of Lodi.

5.17.240 COMPLIANCE WITH LAW.

Nothing contained in this Chapter shall be construed to exempt a State Franchise Holder from compliance with all applicable ordinances, rules, or regulations of the City of Lodi now in effect or which may be adopted that are not inconsistent with this Chapter or California Public Utilities Code Section 5800 et seq.

SECTION 2. All other provisions of Lodi Municipal Code shall remain unchanged and continue in full force and effect.

SECTION 3. Any provisions of the Lodi Municipal Code, or appendices thereto, or any other ordinances of the City, to the extent that they are inconsistent with this ordinance, and no further, are hereby repealed.

SECTION 4. If any section, subsection, sentence, clause, or phrase of this ordinance is for any reason held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of the ordinance. The City Council hereby declares that it would have passed this ordinance and each section, subsection, sentence, clause, and phrase thereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses, or phrases be declared invalid or unconstitutional.

SECTION 5. This ordinance shall go into effect and be in full force and operation from and after thirty days after its final passage and adoption.

SECTION 6. The City Clerk shall cause this Ordinance or a summary thereof to be published and, if appropriate posted, as provided by law. Any summary shall be published and a certified copy of the full text of this Ordinance posted in the Office of the City Clerk at least five (5) days prior to the City Council meeting at which this Ordinance is to be adopted. Within fifteen (15) days after the adoption of this Ordinance, the City Clerk shall cause a summary to be published with the names of those City Council members voting for and against this Ordinance and shall post in the Office of the City Clerk a certified copy of the full text of this Ordinance along with the names of those City Council members voting for and against the Ordinance.

SECTION 7. All ordinances and parts of ordinances in conflict herewith are repealed insofar as such conflict may exist.

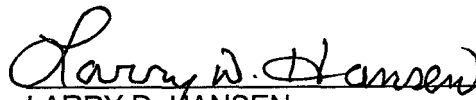
SECTION 8. No Mandatory Duty of Care. This ordinance is not intended to and shall not be construed or given effect in a manner which imposes upon the City, or any officer or employee thereof, a mandatory duty of care towards persons or property within the City or outside of the City so as to provide a basis of civil liability for damages, except as otherwise imposed by law.

SECTION 9. Severability. If any provision of this ordinance or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the ordinance which can be given effect without the invalid provision or application. To this end, the provisions of this ordinance are severable. The City Council hereby declares that it would have adopted this ordinance irrespective of the invalidity of any particular portion thereof.


SECTION 10. The City Council intends this Ordinance to supplement, not to duplicate or contradict, applicable state and federal laws and this Ordinance shall be construed in light of that intent.

SECTION 11. This ordinance shall be published one time in the "Lodi News-Sentinel," a daily newspaper of general circulation printed and published in the City of Lodi, and shall take effect thirty days from and after its passage and approval.

Approved this 18th day of November, 2009


LARRY D. HANSEN
Mayor

Attest:


JENNIFER M. ROBISON
Assistant City Clerk
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State of California
County of San Joaquin, ss.

I, Randi Johl, City Clerk of the City of Lodi, do hereby certify that Ordinance No. 1826 was introduced at a regular meeting of the City Council of the City of Lodi held November 4, 2009, and was thereafter passed, adopted and ordered to print at a regular meeting of said Council held November 18, 2009, by the following vote:


AYES: COUNCIL MEMBERS – Hitchcock, Johnson, Katzakian, Mounce,
and Mayor Hansen

NOES; COUNCIL MEMBERS – None

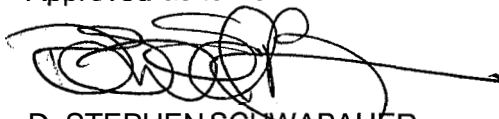
ABSENT: COUNCIL MEMBERS – None

ABSTAIN: COUNCIL MEMBERS – None

I further certify that Ordinance No. 1826 was approved and signed by the Mayor on the date of its passage and the same has been published pursuant to law.


JENNIFER M. ROBISON
Assistant City Clerk

Approved as to Form:


D. STEPHEN SCHWABAUER
City Attorney